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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

5 \* \* \*

6 KENNETH D. BARRETT,

Case No. 3:19-cv-00480-RCJ-WGC

7 Petitioner,

8 v.

**ORDER**

9 RENEE BAKER, *et al.*,

10 Respondents.

11 Petitioner Kenneth D. Barrett, a Nevada prisoner proceeding *pro se*, has filed a Petition for  
12 Writ of Habeas Corpus (ECF No. 1-1) pursuant to 28 U.S.C. § 2254. This matter is before the  
13 Court for preliminary review pursuant to the Rules Governing Section 2254 Cases in the United  
14 States District Courts.<sup>1</sup> For the reasons discussed below, the petition is dismissed following  
15 preliminary review.

16 Under Habeas Rule 4, the assigned judge must examine a habeas petition and order a  
17 response unless it “plainly appears” that the petitioner is not entitled to relief. Habeas Rule 4; *see*  
18 *also Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). Federal law provides two main  
19 avenues to relief on complaints related to incarceration: (1) a petition for habeas corpus, 28 U.S.C.  
20 §§ 2241, 2254 , 2255; and (2) a complaint under the Civil Rights Act of 1871, 42 U.S.C. § 1983.  
21 *See Muhammad v. Close*, 540 U.S. 749, 750 (2004). A state prisoner’s habeas claim is cognizable  
22 under § 2254 only if it falls within the “core” of habeas. *Nettles v. Grounds*, 830 F.3d 922, 930  
23 (9th Cir. 2016) (en banc). If success on a habeas claim would not necessarily lead to a petitioner’s  
24 immediate or earlier release from custody, the claim does not fall within “the core of habeas  
25 corpus” and must be brought, “if at all,” under 42 U.S.C. § 1983. *Id.* at 931.

26 In *Nettles*, a prisoner serving a life sentence with the possibility of parole was found guilty

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28 <sup>1</sup> All references to a “Habeas Rule” or the “Habeas Rules” in this order identify the Rules Governing  
Section 2254 Cases in the United States District Courts.

1 of a disciplinary infraction, which caused 30 days of good time credits to be revoked. 830 F.3d at  
2 925–26. Nettles filed a federal habeas petition seeking restoration of the good time credits and  
3 expungement of the rule violation report that led to the loss of good time credits. *Id.* at 927. The  
4 Ninth Circuit held that Nettles’ claim was not cognizable in habeas. *Id.* at 934–35. Habeas relief  
5 is not available for “probabilistic claims,” *i.e.*, where success on the claims “*could potentially*  
6 *affect the duration of confinement*” or is “*likely to accelerate the prisoner’s eligibility for parole.*”  
7 *Id.* at 933–34 (quotation omitted). In short, a prisoner cannot bring a federal habeas petition  
8 “where ‘a successful challenge to a prison condition will not *necessarily* shorten the prisoner’s  
9 sentence’.” *Id.* at 933 (quoting *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003)). Because  
10 the parole board could have denied parole, even if Nettles succeeded in expunging the rules  
11 violation report, the Ninth Circuit held that a meritorious habeas claim would not necessarily lead  
12 to his immediate or earlier release. *Id.* at 935. Thus, his claim was not within “the core of habeas  
13 corpus” and could not be brought under § 2254 but must be pursued under § 1983, if at all. *Id.*  
14 (quoting *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011)).

15 Here, Petitioner’s petition fails to state a cognizable habeas claim. In January 1986,  
16 Petitioner was convicted of multiple counts of burglary, robbery with use of a deadly weapon,  
17 grand larceny auto, and attempted murder. In his petition, Petitioner asserts that prison officials  
18 have miscalculated his statutory credits for parole eligibility under Nev. Rev. Stat. §§ 209.446 and  
19 213.120(1). He asks this Court to order the Nevada Department of Corrections to produce his  
20 credit history to show that his parole eligibility dates for each of his current and previous sentences  
21 were correctly calculated.

22 If Petitioner were to succeed on this claim, it would only mean an earlier parole hearing.  
23 However, an earlier parole hearing will not necessarily lead to the Petitioner’s immediate or  
24 speedier release because the parole board has the authority and discretion to grant or deny parole.  
25 *Wydeven v. Warden, Lovelock Corr. Ctr.*, 238 P.3d 867 (Nev. 2008) (citing Nev. Rev. Stat.  
26 § 213.1099(2)) (“The decision of whether or not to grant parole lies within the discretion of the  
27 parole board and the creation of standards does not restrict the Parole Board’s discretion to grant  
28 or deny parole.”). As success on Petitioner’s claims would not necessarily lead to his immediate

1 or speedier release, they do not fall in the “core” of habeas and must be brought, if at all, under 42  
2 U.S.C. § 1983.<sup>2</sup> See *Rouser v. Sullivan*, 2019 WL 1934483, at \*2 (E.D. Cal. May 1, 2019);  
3 *Stanhope v. Ryan*, 2017 WL 1163303, at \*8 (D. Ariz. Mar. 29, 2017); *Gordon v. Premo*, 757 Fed.  
4 App’x 627, 628 (9th Cir. 2019) (unpublished disposition).

5 Additionally, the Court declines to recharacterize Petitioner’s petition as a § 1983  
6 complaint. When a habeas petition is amenable to conversion on its face, federal courts may  
7 construe the petition to plead causes of action under § 1983. *Nettles*, 830 F.3d. at 935–36; see also  
8 *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971). However, habeas actions and § 1983 prisoner  
9 civil rights cases “differ in a variety of respects—such as the proper defendant, filing fees, the  
10 means of collecting them, and restrictions on future filings—that may make recharacterization  
11 impossible or, if possible, disadvantageous to the prisoner compared to a dismissal without  
12 prejudice of his petition for habeas corpus.” *Nettles*, 830 F.3d. at 935–36 (quotation omitted); see  
13 also *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000) (holding that a court should not  
14 recharacterize a prisoner’s pro se filing as a federal habeas petition when doing so may be to the  
15 prisoner’s disadvantage). In this case, the petition is not amenable to conversion on its face  
16 because it is not clear that Petitioner has named the proper defendant or whether recharacterization  
17 would disadvantage Petitioner. The Court therefore dismisses the petition without prejudice and  
18 instructs the Clerk of Court to send Petitioner a form complaint for § 1983 civil rights actions.

19 For the above stated reasons,

20 **IT IS THEREFORE ORDERED:**

- 21 1. Petitioner Kenneth D. Barrett’s Petition for Writ of Habeas Corpus (ECF No. 1-1) is  
22 DISMISSED WITHOUT PREJUDICE.  
23 2. Petitioner is DENIED a certificate of appealability, as jurists of reason would not find  
24 the dismissal of this action on the grounds set forth above to be debatable or wrong.

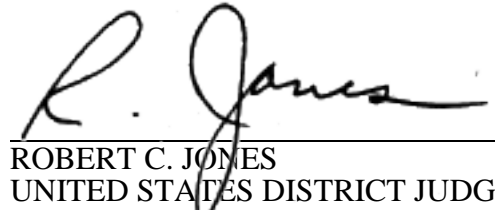
25  
26 <sup>2</sup> The Court has not completed a review of other potential issues that may arise if Petitioner files a § 1983  
27 complaint. This order does not explicitly or implicitly find that a § 1983 complaint would be free of  
28 deficiencies, procedural or otherwise. In addition, the Court expresses no opinion regarding the exhaustion  
of administrative remedies, which is a prerequisite to filing a complaint presenting constitutional claims to  
the federal courts. 42 U.S.C. § 1997e (Prison Litigation Reform Act or “PLRA”); *Nettles*, 830 F.3d at 932.

1 3. Petitioner's Application to Proceed *In Forma Pauperis* (ECF No. 1), Motion to Extend  
2 Copywork Limit (ECF No. 1-4), and Motion for Counsel (ECF No. 1-5) are DENIED  
3 as moot.

4 4. The Clerk of Court is directed to:

- 5 a. FILE the Petition (ECF No. 1-1), Motion to Extend Copywork Limit (ECF No. 1-  
6 4), and Motion for Counsel (ECF No. 1-5) on the docket;  
7 b. ENTER final judgment and CLOSE this case; and  
8 c. MAIL Petitioner one blank copy of (i) the *in forma pauperis* application for  
9 prisoners and (ii) form complaint for § 1983 civil rights actions.

10 DATED: This 12<sup>th</sup> day of September, 2019.

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12 ROBERT C. JONES  
13 UNITED STATES DISTRICT JUDGE  
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